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THE DISTRICT OF COLUMBIA RETIREMENT REFORM ACT OF 1979: WAS ELIMINATING THE AGGRAVATION CLAUSE AN UNWARRANTED REMEDY?

In response to past abuses of the District of Columbia's pension system by some police officers and firefighters,¹ Congress enacted the District of Columbia Retirement Reform Act on November 17, 1979.² Although the disability provisions of the Act are designed to make the pension system

1. The disability provisions of the Act are a response to the disproportionate number of disability retirees from the District's police and fire departments and the staggering cost to the city of police and firefighter's retirement pensions. *District of Columbia Pension Reform Act: Hearing on S. 1813, S. 2316, H.R. 6536 Before the Subcomm. on Governmental Efficiency and the District of Columbia of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 660 (1978) [hereinafter cited as *1978 Hearings*] (statement of Edwin F. Boynton, Actuary for the Wyatt Co.). Boynton's figures indicate the following comparisons between the District of Columbia, New York City, Baltimore, and Los Angeles as to the number of pension beneficiaries in 1975:

	District of Columbia Police & Fire	New York City		Baltimore Police & Fire	Los Angeles Police & Fire
		Police	Fire		
1. Retired for Age or Servie	\$ 615	\$ 9,836	\$3,915	\$ 493	\$4,269
2. Retired for Disa- bility	2,904	1,772	106	642	1,021
3. Survivors of Deceased Members	<u>1,202</u>	<u>102</u>	<u>139</u>	<u>173</u>	<u>1,850</u>
4. Total	\$4,721	\$11,710	\$4,610	\$1,308	\$7,140

Id. at 696. In 1978, it was projected that the District would have to pay an amount equal to 55% of its active payroll into the police and firefighter's retirement and disability plan. *Id.* at 693. According to Boynton's projections, the cost of these pensions under the existing pay-as-you-go system of funding would increase to 101% of the active payroll in the year 2000. *Id.* See note 67 *infra*.

2. District of Columbia Retirement Reform Act, 1979, Pub. L. No. 96-122, 93 Stat. 866 (1979) [hereinafter cited as Retirement Reform Act of 1979]. The Act establishes a federally assisted retirement fund for District police officers, firefighters, teachers, and judges, provides for management of the funds, and "provide[s] disability retirement benefits which compare with other cities and provide the annuitant a sufficient retirement allowance while

financially viable by minimizing the opportunity for fraudulent compensation claims, Congress may have overreacted to the past abuses. In particular, the elimination of the so-called "aggravation" clause,³ which allowed an inference of on-duty causation where proximate cause of a claimant's injury was doubtful or shown to be outside the scope of employment but aggravated in the performance of duty, appears to have foreclosed the opportunity for many bona fide claimants to recover deserved disability pensions. This Comment will examine the evolution of the aggravation provision, its application in practice, the reasons for its repeal, and the effect that its elimination will have on police officers and firefighters who are disabled by the on-duty aggravation of a preexisting condition.

I. THE DEVELOPMENT OF DISABILITY RETIREMENT PROVISIONS
GOVERNING POLICE OFFICERS AND FIREFIGHTERS IN THE
DISTRICT OF COLUMBIA

Every police officer and firefighter is aware that a violent occupational incident could result in a lifetime disability or even death. The risk of such injury is inherent in the hazardous nature of the work and must be faced by police officers and firefighters every day on the job.⁴ Death or serious injury, however, represent only two aspects of these hazards. These civil servants may also become disabled through the more subtle and prevalent conditions incident to their inherently extreme working conditions.⁵ For example, irregular working hours and anxiety about the constant risks of the job put unusual pressures on the physical health of employees as well as emotional strains on their familial relationships.⁶ Additionally, police

keeping pension costs at a level the District can afford." S. REP. NO. 237, 96th Cong., 1st Sess. 1 (1979).

3. D.C. CODE § 4-527(2) (1973 & Supp. 1978).

4. See 1978 Hearings, *supra* note 1, at 135-48 (Int'l Ass'n of Fire Fighters' "Annual Death and Injury Survey" for 1975 and 1976). These reports illustrate the alarming number of firefighters killed or injured in on-the-job accidents or from occupational diseases every year.

5. "Police duty frequently has an adverse effect on the state of one's health." *Id.* at 184 (statement of Joseph S. Goldring, President, Police Ass'n of the District of Columbia). Goldring cited working outdoors in all types of weather, stress, harassment, and other duty-related factors as contributing to the fact that "police officers are more susceptible to conditions such as arthritis, high blood pressure, heart disease, ulcers and nervous disorders than are most citizens." *Id.*

6. *Financing Retirement Funds for Police, Firemen, Teachers, and Judges: Hearings on H.R. 2465 and H.R. 6536 Before the Subcomm. on Fiscal and Government Affairs and the House Comm. on the District of Columbia*, 95th Cong., 1st Sess. 255, 258 (1977) [hereinafter cited as 1977 Hearings] (statement of Joseph S. Goldring). Police officers and firefighters do not work normal hours and do not always receive holidays which coincide with those of their families and friends. Also, a police officer or firefighter and his spouse are constantly

officers and firefighters are subject to many other unique stresses⁷ that may lead to serious "diseases of adaptation."⁸

Recognizing that an adequate and equitable retirement plan for these types of disabilities is an important element for the maintenance of a quality police and firefighting force,⁹ the District of Columbia, prior to the passage of the Retirement Reform Act of 1979, had one of the most liberal pension systems in the country.¹⁰ Besides providing these high risk em-

subjected to anxiety stemming from uncertainty about what hazards each day on the job might entail. *Id.*

7. Stresses generated by police work include the suspicious nature an officer must develop in order to survive, having to deal with crisis situations, having to make life and death decisions, fear, hostile public attitudes, and even boredom from the routine aspects of the job. Holt, *Coping With the Special Stresses of Police Work*, Wash. Star, Feb. 14, 1978, § A, at 1, col. 1. Firefighters labor under many of the same types of stressful conditions.

8. Stressful conditions may contribute to or lead to such "diseases of adaptation" as "heart attacks, hypertension, ulcers, kidney disorders, allergic reactions, insomnia, headaches and other ailments [and may] also [cause] emotional disturbances which may lead to divorce, alcoholism, drug abuse and suicide." *Id.* at col. 3-4. Holt reported that "Police Administrators are becoming more concerned about the escalating costs in paid sick leave and compensation and disability pensions, much of which are stress related." *Id.* at col. 5. Many police departments around the country have set up special programs to deal with problems of stress. *Id.*

9. See 1978 Hearings, *supra* note 1, at 711-23 (statement of Robert E. Peterson, President, Greater Washington Labor Council, AFL-CIO). Peterson noted that in the case of firefighters and police, it is essential that a retirement system, which protects the future financial security of individuals injured in the line of duty, be supported. This protection is of paramount importance if the citizens of this City are to expect D.C. fire fighters and police to expose themselves to high risk situations and perform dangerous, but essential, fire fighting and crime control maneuvers.

Id. at 712.

10. 1978 Hearings, *supra* note 1, at 103 (statement of Edwin F. Boynton, Actuary, the Wyatt Company). Figures taken from a United States Department of Commerce report indicate the following comparisons of average monthly payments for the year 1975:

	District of Columbia Police & Fire	New York City		Baltimore Police & Fire	Los Angeles Police & Fire
		Police	Fire		
1. Retired for Age or Service	\$1,225	\$ 585	\$ 676	\$ 423	\$ 720
2. Retired for Disa- bility	1,225	585	545	538	598
3. Survivors of Deceased Members	<u>449</u>	<u>585</u>	<u>619</u>	<u>193</u>	<u>709</u>
4. Average of Total Monthly Payments	\$1,027	\$ 585	\$ 671	\$ 449	\$ 700

ployees with peace of mind, the generous disability compensation provisions were a valuable recruiting tool for the District.¹¹ The liberality of the pension program encouraged abuse, however, and for a time it appeared that practically anyone could retire on the basis of disability. Such abuse placed a severe strain on the city's budget.¹² The proportion of annuitants who retired under the disability retirement provisions,¹³ as opposed to those who retired on the basis of age or longevity of service,¹⁴ was unconscionably lopsided. In 1969, the situation reached an extreme when ninety-eight percent of retiring police officers and ninety-nine percent of retiring firefighters left the forces on the basis of disability.¹⁵ Although that figure declined steadily thereafter, it was still over fifty percent in 1977.¹⁶

Id. at 696 (citing UNITED STATES DEPARTMENT OF COMMERCE, FINANCES OF EMPLOYEE RETIREMENT SYSTEMS OF STATE AND LOCAL GOVERNMENTS IN 1974-1975 23-28 (1976)).

11. See 1977 *Hearings*, *supra* note 6, at 271-75 (statement of Peter T. Lyons, Int'l Bhd. of Police Officers). Lyons testified that "[t]he retirement benefits afforded this group of professionals has been one of the main inducements in acquiring the caliber . . . of men and women needed to maintain an efficient and effective police force." *Id.* at 272-73. See also *District of Columbia Retirement Reform Act: Financing Retirement Funds for Police, Firemen, Teachers, and Judges: Hearings on H.R. 3560 and H.R. 3939 Before the Subcomm. on Fiscal Affairs and Health and the Comm. on the District of Columbia*, 96th Cong., 1st Sess. 153, 155 (1979) (statement of Mayor Marion S. Barry, Jr.) [hereinafter cited as 1979 *Hearings*]. In opposing drastic benefit changes which would be applicable to current District of Columbia employees, Mayor Barry noted that "[t]he city's attractive retirement program has played a central role in recruiting public safety employees, particularly during the massive buildup of the police force that took place about ten years ago as a result of Presidential and Congressional action." *Id.* at 155. In fact, the pendency of pension reform measures in Congress and the uncertainty of the outcome of legislation led a neighboring police force actively to recruit experienced District of Columbia police officers, as that jurisdiction had recently raised its retirement benefits to attractive levels. 1977 *Hearings*, *supra* note 6, at 257 (statement of Joseph S. Goldring, President, Police Ass'n of the District of Columbia).

12. The accrued unfunded pension liability of the District of Columbia was approximately \$2.04 billion in 1977, of which \$1.4 million was attributable to the police and firefighter's pension system. 1977 *Hearings*, *supra* note 6, at 1. In 1977, the police and firefighter's pension system made annuity payments which equalled 51.6% of the total active payroll for those departments. *Id.* See also note 67 *infra*.

13. D.C. CODE §§ 4-526, 4-527 (1973 & Supp. 1978).

14. D.C. CODE § 4-528 (1973 & Supp. 1978).

15. *Pension Revision: A Must*, Wash. Star, Feb. 26, 1978, § D, at 2, col. 1.

16. Disability retirement percentages in the District of Columbia for the years 1969-1977 were reported to Congress to be declining as follows:

These relatively high rates of disability retirements in the District can be attributed largely to the economic advantages disability annuities have over regular retirement benefits and the previously liberal judicial and administrative interpretations of the city's pension laws. A disability retirement may be more advantageous to an annuitant than an age or length of service retirement primarily for two reasons. First, disability retirement benefits are not as highly taxed,¹⁷ making them more desirable than service or age retirement payments even if those payments are higher.¹⁸ Second, under the former provisions, an annuitant who was disabled as a result of an on-duty injury, disease, or aggravation of an injury or disease received a minimum annuity of two-thirds of his average pay,¹⁹ whereas an annuitant who had retired for age or length of service received only half of his average pay.²⁰

<u>Year</u>	<u>Police</u>	<u>Fire</u>
1969	98	99
1970	98	95
1971	77	92
1972*	71	87
1973	55	71
1974	49	58
1975	65	55
1976	67	47
1977	52	63

* It should be noted that "Data through 1972 represent board actions; data beginning 1973 represent actual requirements."

1978 Hearings, *supra* note 1, at 658.

17. I.R.C. § 105(d).

18. See 1978 Hearings, *supra* note 1, at 662 (statement of Edwin F. Boynton, Actuary for the Wyatt Company).

19. D.C. CODE § 4-527 (1973 & Supp. 1978). "Average pay" was defined as the highest annual rate resulting from averaging the member's rates of basic salary in effect over any twelve consecutive months of police or fire service, with each rate weighted by the time it was in effect, except that if the member retires under section 4-527 and if on the date of his retirement . . . he has not completed twelve consecutive months of police or fire service, [average pay] means his basic salary at the time of his retirement.

D.C. CODE § 4-521(17) (1973 & Supp. 1978).

20. D.C. CODE § 4-528 (1973 & Supp. 1978). Under former § 4-528, a member of the police or fire department could, after 20 years of service, elect to take an optional retirement. Benefits under this type of retirement were computed at a rate of 2 1/2% of the retiree's average pay for each year of service (3% for each year over 20 years) with a maximum annuity of 80% of average pay. On the other hand, a disability retirement under § 4-527 for a disability received in the course of duty or aggravated by such duty was computed at a rate of 2 1/2% of the retiree's average pay for each year of service, with a *minimum* of 66 2/3% and a maximum of 70% of the retiree's average pay. Therefore, in order for service retirement benefits to equal the minimum on-duty disability payments an officer or firefighter

Perhaps the prime reason for the disproportionate number of service-related disability retirements in the District of Columbia, however, was the "aggravation" provision of section 4-527 of the District of Columbia Code.²¹ Enacted by Congress²² to "create an additional category of service-connected disability,"²³ the aggravation clause ratified the approach previously taken by the Court of Appeals²⁴ in cases where the precise cause of disability was unclear.²⁵ By explicitly allowing an inference of

would have to work for 25 1/2 years. Compare D.C. CODE § 4-527 with D.C. CODE § 4-528. This does not take into consideration the tax benefit which the disability annuitant would also gain. See notes 17-18 *supra*.

However, the provisions for retirement on the basis of a disability not incurred nor aggravated in the course of duty were not as generous. D.C. CODE § 4-526 (1973 & Supp. 1978). Annuitants who had completed at least 5 years service were eligible for a minimum pension of 40% of average pay or 2% for each year of service up to a maximum of 70% of average pay. This section, like § 4-527, provided a minimum percentage regardless of the extent or nature of the disabling condition. D.C. CODE §§ 4-526, 4-527 (1973 & Supp. 1978).

21. D.C. CODE § 4-527(2) (1973 & Supp. 1978) reads, in pertinent part:

(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty.

Id.

22. Policemen and Firemen's Retirement and Disability Act Amendment of 1962, Pub. L. No. 87-857, 76 Stat. 1133 (current version at 93 Stat. 902 (1979)).

23. H.R. REP. NO. 892, 87th Cong., 1st Sess. 1 (1961).

24. The District of Columbia Code provides for judicial review of decisions of agencies of the District of Columbia. D.C. CODE § 1-1510 (1973 & Supp. 1978) provides that: [a]ny person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof . . . upon filing in the District of Columbia Court of Appeals a written petition for review.

Id. Decisions of the Police and Firemen's Retirement and Relief Board are not exempt from judicial review on the ground that they are not "contested cases." *Johnson v. Board of Appeals & Review*, 282 A.2d 566, 568 (D.C. 1971), *cert. denied*, 405 U.S. 955 (1972). Prior to the Court Reform Act in the District of Columbia, this judicial review was conducted by the United States District Court in the District of Columbia and the United States Court of Appeals, District of Columbia Circuit. See, e.g., *Crawford v. McLaughlin*, 286 F.2d 821 (D.C. Cir. 1960). See also notes 39-40 and accompanying text *infra*. Since the court reform, review has been conducted by the District of Columbia Court of Appeals. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 111, 84 Stat. 475. See, e.g., *Johnson v. Board of Appeals & Review*, 282 A.2d 566 (D.C. 1971), *cert. denied*, 405 U.S. 955 (1972).

25. See, e.g., *Crawford v. McLaughlin*, 286 F.2d 821 (D.C. Cir. 1960). In *McLaughlin*, since the Court of Appeals found no evidence indicating that the appellant's back injury had not grown out of an injury or disease incurred in the performance of duty, it held that the record supported a disability retirement under § 4-527. *Id.* at 822. The court did not require a showing of direct causation between the disabling condition and the on-duty injury which allegedly caused it.

on-duty causation in cases where the proximate cause of an injury was doubtful or was shown to be outside the scope of employment but aggravated in the performance of duty,²⁶ the provision significantly eased the burden of obtaining an annuity under section 4-527.²⁷ The United States Court of Appeals for the District of Columbia Circuit viewed this amendment as an endorsement of the rationale that the humane purpose of disability retirement provisions²⁸ justified a liberal interpretation of those provisions "in a light more favorable to the applicant seeking relief than in the usual type of civil action."²⁹

As if the aggravation clause of section 4-527 were not liberal enough, however, judicial interpretation of the disability retirement laws made the situation even more favorable to retiring employees. For instance, in *Blohm v. Tobriner*,³⁰ the federal court of appeals held that when disability retirement proceedings were initiated by the police department against the officer's will, the burden would be on the department to show that the disability was *not* connected to an on-duty injury or disease.³¹ The court also required that such evidence "clearly preponderate and be substantial and persuasive."³² Later, the *Blohm* requirement was expanded to include situations in which the retiree did not contest the fact that he was disabled but was unwilling to concede that his disability was not incurred in the performance of duty.³³ Furthermore, in 1968, the circuit court in *Wingo v.*

26. D.C. CODE § 4-527(2) (1973 & Supp. 1978).

27. *Id.* The District of Columbia Code permitted two types of disability retirements. Under § 4-527, a disabled police officer or firefighter could be retired for a disability caused by or aggravated by an injury or disease which occurred in the performance of duty. D.C. CODE § 4-527 (1973 & Supp. 1978). However, if the disabling condition was neither caused nor aggravated by duty-related factors, the retirement would be granted under § 4-526. D.C. CODE § 4-526 (1973 & Supp. 1978). Benefits under these two provisions varied significantly, making retirement under § 4-527 far more desirable for the annuitant.

28. *See, e.g.,* Hyde v. Tobriner, 329 F.2d 879, 881 (D.C. Cir. 1964); Crawford v. McLaughlin, 286 F.2d 821, 822 (D.C. Cir. 1960); Lynch v. Tobriner, 237 F. Supp. 313, 316 (D.D.C. 1965).

29. Hyde v. Tobriner, 329 F.2d 879, 881 (D.C. Cir. 1964).

30. 350 F.2d 785 (D.C. Cir. 1965).

31. *Id.* at 786.

32. *Id.* *See also* Carroll v. Tobriner, 535 F. Supp. 87, 88-89 (D.D.C. 1966) (*Blohm* test applied where cause of disease was in doubt).

33. Monica v. Tobriner, 253 F. Supp. 851, 852-53 (D.D.C. 1966) ("physical injury to and emotional stresses upon the plaintiff . . . definitely exacerbated the anxiety which forced his retirement" thus meriting retirement under § 4-527). In Lynch v. Tobriner, 237 F. Supp. 313 (D.D.C. 1965), the District Court had recognized that a duty-related disability might result from emotional as well as physical trauma or injury. *Id.* at 314-16. In arriving at this decision, the court said:

The word "injury" is not limited to injuries caused by violence or physical force. It must be given a broader and more liberal meaning. It includes *any* injury, or dis-

*Washington*³⁴ elevated the *Blohm* requirement that evidence "clearly preponderate and be substantial and persuasive"³⁵ to the level of a presumption of line-of-duty disability.³⁶ Although *Wingo* practically created a carte blanche license to receive a section 4-527 disability pension, the impact of the decision proved to be short-lived.

Two Acts of Congress, while not specifically addressing the review of Retirement Board decisions by the courts, had a direct effect upon such review and resulted in a significant tightening of the availability of on-duty disability retirements. The first of these was the District of Columbia Administrative Procedure Act of 1968.³⁷ Section 11(3) of that Act significantly relaxed the evidentiary standard applied in *Wingo* by requiring administrative orders and decisions to be supported by "substantial evidence in the record."³⁸ This, of course, made it easier for the city to prove a disability was not incurred in the line of duty, but its ramifications were minor compared to the effect that the District of Columbia Court Reform and Criminal Procedure Act of 1970³⁹ had on the interpretation of the District's disability retirement provisions. Section 111 of that Act amended Title 11 of the District of Columbia Code to give the District of Columbia Court of Appeals jurisdiction to review administrative orders and decisions.⁴⁰ While the court reform itself had no impact on the *interpretation* of the District's disability retirement provisions,⁴¹ review of Retirement Board decisions by the District of Columbia Court of Appeals had a profound effect on the *application* of those provisions.

In *Johnson v. Board of Appeals & Review*,⁴² the District of Columbia

ease, or illness arising out of and in the course of the employment, which causes incapacity. Such construction must be given in order that the humane purpose of the law may be realized. Courts must keep in mind the benefits intended to be conferred by the law.

Id. at 316. The disability in *Lynch* was "emotional tension or stress syndrome" as evidenced by "essential hypertension . . . with uncontrolled elevations in blood pressure, and . . . hypertensive cardiovascular disease." *Id.* at 315.

34. 395 F.2d 633 (D.C. Cir. 1968).

35. 350 F.2d at 786.

36. 395 F.2d at 635. The court also required that the Retirement Board's findings be supported by adequate evidence in the record. *Id.* at 636.

37. Pub. L. No. 90-614, 82 Stat. 1203 (1968) (codified at D.C. CODE §§ 1-1501 to -1510 (1973)).

38. D.C. CODE § 1-1510(3)(E) (1973).

39. Pub. L. No. 91-358, 84 Stat. 473 (codified in scattered sections of D.C. CODE (1973)).

40. D.C. CODE § 11-722 (1973).

41. D.C. CODE §§ 4-526 and 4-527 were not affected by the Court Reform Act of 1970.

42. 282 A.2d 566 (D.C. 1971). Because of common questions of law presented, the *Johnson* decision consolidated two similar cases for the purpose of disposition. *Id.* at 567. Both petitioners were former members of the United States Park Service who had been

Court of Appeals held that, where the original cause of disability was doubtful or outside the scope of employment, the burden was on the *claimant* to prove that the initial injury or disease had been aggravated by on-duty factors.⁴³ In *Johnson*, the court of appeals reviewed two Retirement Board decisions that had found no evidence of incidents or duty-related circumstances to connect the claimants' disabilities with their services for the Park Police.⁴⁴ Although both petitioners had asserted that on-duty experiences had caused or aggravated their conditions, they were unable to carry their burden of proof because of the tenuous character of their claims.⁴⁵ Under the previous federal rule placing the burden on the government to show that the disease or injury was *not* caused or aggravated by incidents occurring in the performance of duty,⁴⁶ the claimants may still have prevailed despite the paucity of their evidence. But, since the D.C. Court of Appeals shifted this burden in *Johnson*, neither claimant was successful.

The *Johnson* decision implicitly recognized the abuses of the disability pension system, evidenced by the painstaking manner in which the court finessed the *Blohm*⁴⁷ and *Wingo*⁴⁸ precedents along with the legislative

retired by the Retirement Board for disabilities not incurred in the performance of duty. On appeal, they both contended that their respective disabilities had been incurred or aggravated in the course of duty. *Id.*

43. *Id.* at 570.

44. *Id.* at 569. In both cases, the Board of Appeals and Review had sustained those findings. *Id.*

45. Petitioner Johnson pointed to three specific experiences with the Park Police:

(1) his duty during the 1968 riots and demonstrations, (2) having to drop an assault charge against a diplomat at the insistence of his commanding officer, and (3) being told in a "gruff" manner by his superior officer to go out and correct some 40 parking citations he had misdated earlier that day.

282 A.2d at 568. Petitioner Paxton pointed to such factors as the long hours he had served during the 1968 riots, aggravation of his suspicious nature by virtue of detective work, and his feelings of persecution by a superior officer who petitioner felt was "watch[ing] him constantly, refus[ing] to give him credit for work done, and quibbl[ing] over minor discrepancies in his reports" in an attempt to manufacture grounds for firing him. *Id.* at 569.

46. Petitioners had cited both *Blohm* and *Wingo* to support this construction of the aggravation provision. 282 A.2d at 570. See notes 30-36 and accompanying text *supra*.

47. 350 F.2d 785 (D.C. Cir. 1965). The *Johnson* decision relied heavily on the language of the aggravation provision of § 4-527(2) which it interpreted as "strongly suggesting" that the burden was on the claimant to prove on-duty aggravation in cases where the original causation was in doubt or admittedly outside the scope of duty. 282 A.2d at 570. The Court distinguished *Blohm* as having involved a claimant who had made a showing that the original injury had occurred on the job and said that, in such a case, the possibility of a causal connection between that injury and the disabling condition could not be ruled out. *Id.* The Court limited the *Blohm* holding to situations in which the claimant had made a showing of a duty-related injury, stating that "[i]n short, all that [*Blohm*] held was that where a claimant makes a showing of a service-incurred injury, the opposing side must then offer evidence

history of the aggravation clause.⁴⁹ After *Johnson*, the availability of a disability retirement based on the aggravation provision was greatly restricted where the original causation was unclear or outside of duty, despite the more relaxed standard of proof under the 1968 Administrative Procedure Act.⁵⁰ The effect of the decision was amply borne out by the

disproving the logical inference that the ensuing disability was the long term result of such injury." *Id.* The Court buttressed this distinction with the fact that the aggravation provision of § 4-527(2) was not enacted until after the claimant's appeal to the Commissioners had been rejected. *Id.*

48. 395 F.2d 633 (D.C. Cir. 1968). The *Wingo* decision was more difficult for the court to distinguish from *Johnson*, since, unlike *Blohm*, it had involved a mental rather than physical disorder, and had facts similar to the cases under consideration. 282 A.2d at 570-71. In *Wingo*, the claimant had alleged that his disabling mental condition resulted from such factors as a killing he had had to commit in the line of duty, harassment on the job, anxiety about the results of a disciplinary proceeding against him, a feeling that the police force was spying on him, and depression from having been reprimanded by a superior officer. 395 F.2d at 635. The *Johnson* court was forced to distinguish the two cases by a simple finding that the *Wingo* decision had been based upon the first subsection of § 4-527 rather than upon the aggravation provision of subsection (2) because to find otherwise "would bring this decision in *Wingo* into conflict with the language of the statute." 282 A.2d at 571. The court bolstered this rather circular distinction by mentioning that at least one of the factors alleged as an on-duty aggravating or causative event by the claimant in *Wingo*, that of having had to kill in the line of duty, might have had "lasting traumatic consequences." *Id.* Factors of the type put forth by the claimants in *Johnson* were dismissed as "symptoms" rather than "products of aggravating causes." *Id.* See note 45 *supra* (factors alleged by petitioners in *Johnson*).

49. H.R. REP. NO. 892, 87th Cong., 1st Sess. (1961). In *Lewis v. District of Columbia Bd. of Appeals & Review*, 330 A.2d 253, 255-56 (D.C. 1974), the court of appeals had to resolve a conflict between the *Johnson* holding as to the burden of proof in an aggravation case and the language of the House of Representatives report which had accompanied the enactment of the aggravation provision. That report expressly stated that the purpose of the amendment was twofold: "to create an additional category of service-connected disability" and to "place the burden of proof on the Government that such duty did not aggravate the injury or disease contracted (it may or may not have been incurred or contracted in the performance of duty)." H.R. REP. NO. 892 *supra*. The Senate Report did not contain any mention of the burden of proof. S. REP. NO. 2271, 87th Cong., 2d Sess. (1962). The court was able to disregard the House report by finding that since the legislative history was "contradictory" it should look only to the language of the provision itself for guidance. 330 A.2d at 255. The court examined that language to find that as the "statute requires that the injury or disease be 'shown to have been aggravated by the performance of duty . . .,' [it is] [n]ecessarily . . . the claimant and not the government who is in the position to make this showing." *Id.*

50. Pub. L. No. 90-614, 82 Stat. 1203 (1968) (codified at D.C. CODE §§ 1-1501 to -1510). The Act imposes a substantial evidence requirement before the Board and the reviewing courts. Hence, the burden on the claimant before the Board was lessened by the Act from the preponderance of evidence test which had previously been applied. However, if a claimant was unable to meet that burden before the Board, it would be more difficult to prevail before the court of appeals since the Board's decision need only be supported by substantial evidence rather than by a clear preponderance of evidence.

almost immediate decline in disability retirements after the decision.⁵¹ By making it necessary for a claimant to prove his disability by substantial evidence, rather than requiring the government to establish by a clear preponderance that a disability was not duty-related, *Johnson* effectively eliminated any possibility for fraudulent recovery under the aggravation clause.

During the same time period that the District of Columbia Court of Appeals grappled with the interpretation of the disability retirement laws, the city government also undertook to restrict abuse of those provisions through certain administrative improvements in the functions of the police and fire departments, the Board of Surgeons, the Retirement Board, and the Casualty Investigations branch.⁵² For instance, the police and fire departments agreed to try to reassign individuals to jobs within their physical limitations either on a temporary or more permanent basis.⁵³ The Board of Surgeons attempted to establish explicit medical criteria to determine whether an injury or disease was incurred in the performance of duty and agreed to refer claimants to a broad range of experts for medical advice.⁵⁴ Likewise, the Retirement Board began making its own referrals to outside experts and also instituted several procedural changes involving documentation of the claimant's condition.⁵⁵ Finally, the District established a Casualty Investigations Branch to investigate abuses of sick leave and disability retirement.⁵⁶ Mayor Marion Barry observed that these combined efforts of the city, in cooperation with the courts, had produced very favorable results in increasing the effectiveness of the administration of police and fire department disability retirements.⁵⁷

51. Disability retirements among police officers and firefighters peaked in 1969-1970 at 95-99% and began to decline in 1971, the year *Johnson* was decided. See note 16 *supra*. That this overall decline was due in part to the more restrictive approach toward the aggravation provision is illustrated by the decline in disability retirements based on that provision as opposed to other disability retirements from approximately 80% in the late 1960's to less than 25% since 1975. 1979 *Hearings*, *supra* note 11, at 209 (Appendix A, letter of Mayor Marion Barry, Jr.).

52. See *id.* at 209-10.

53. *Id.* at 210.

54. *Id.*

55. *Id.* These procedural changes required the filing of medical reports to the Board no later than 10 days before review. This would allow ample time for consideration and would provide documentation for use at later medical reviews. *Id.*

56. *Id.*

57. *Id.* at 209. Barry cited the decrease in disability retirements, the decrease of disability retirements based on the aggravation provision, and tightened enforcement of the recovery from disability provision, D.C. CODE § 4-530 (1973 & Supp. 1978), as indicative of the improvements made in the area of disability retirements. See 1979 *Hearings*, *supra* note 11, at 209-10 (Appendix A, letter of Mayor Marion Barry, Jr.).

II. THE DISTRICT OF COLUMBIA RETIREMENT REFORM ACT OF NOVEMBER 17, 1979

A. *The Fight for a New Bill*

During the same time period that these administrative and judicial reforms were being instituted in response to abuses of the District's police and firefighter's pension system, Congress became concerned about the status of these pension plans.⁵⁸ In particular, Congress focused upon the serious funding problems which faced the District after home rule.⁵⁹ The legacy of congressional management of the District's pension system had left the newly established home rule government with an unfunded pension system for police and firefighters and a pension program for teachers and judges "so inadequate as to be considered unfunded."⁶⁰

In 1978, the drive to pass a retirement reform act was given considerable momentum by the retirement of three top police and fire department officials, all of whom claimed and received on-duty disability retirements under section 4-527. Police Chief Maurice J. Cullinane was granted a \$31,683 tax-free disability pension because of a circulatory condition⁶¹ in his left leg which had been injured during 1968 and 1970 demonstrations.⁶² Shortly thereafter, Fire Chief Burton W. Johnson applied for a disability retirement on the basis of a back injury allegedly received in the performance of duty.⁶³ After serving on the police force for thirty years, Assistant Police Chief Tilmon B. O'Bryant requested disability benefits

58. See H.R. 15139, 93d Cong., 2d Sess. (1974). This legislation did not get beyond the subcommittee stage "because [the Office of Management and Budget] failed to acknowledge a Federal responsibility to assist the District in funding retirement benefits granted prior to home rule." 1979 *Hearings*, *supra* note 11, at 2. See also S. REP. NO. 237, 96th Cong., 1st Sess. 7 (1979). Bills on the issue were again introduced in 1976, 1977, and 1978. See H.R. 12441, H.R. 13467, H.R. 14960, 94th Cong., 2d Sess. (1976); H.R. 2465, H.R. 6536, 95th Cong., 1st Sess. (1977); S. 1813, S. 2316, 95th Cong., 2d Sess. (1978).

59. District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, 87 Stat. 774.

60. S. REP. NO. 237, 96th Cong., 1st Sess. 3 (1979).

61. Cullinane was diagnosed as suffering from "thrombo-phlebitis." *D.C. Police Board Votes to Approve Cullinane's Retirement on Disability*, Wash. Post, Jan. 6, 1978, § A, at 1, col. 1.

62. *Id.* at 4, col. 2. Cullinane was kicked in the knee on Nov. 5, 1968 by an antiwar demonstrator. On May 9, 1970, the knee was reinjured by a brick thrown during a demonstration. During the period between the injuries and his retirement in January, 1978, Cullinane suffered from "frequent and severe episodes of pain and swelling in the left knee that [had] prevented him from working." *Id.* at 4, col. 3. The blood clots in his leg were diagnosed as "life threatening." *Id.* at 1, col. 1.

63. *District Fire Chief Will Retire, Seek Disability Pension*, Wash. Star, Feb. 14, 1978, § A, at 1, col. 5.

based on high blood pressure and hypertension.⁶⁴ These three disability retirements, occurring in quick succession, flooded local newspapers with indignant editorials and articles critical of the District's pension system.⁶⁵ Unfortunately, the articles focused on the disproportionate number of disability retirees on city pensions⁶⁶ and the corresponding danger to the city's financial stability,⁶⁷ but barely touched on the improvements that had been made in the proportion of disability to service retirements since 1969.⁶⁸ As might be expected, this unfavorable publicity added fuel to the congressional debate and hardened Congress's resolve to act quickly to

64. *Veteran Police Official Seeks \$32,840 Pension*, Wash. Post, Feb. 22, 1978, § C, at 1, col. 1.

65. See, e.g., *Costly Pensions — Fire, Police Disability Payments Escalating*, Wash. Post, Jan. 8, 1978, § A, at 1, col. 1 [hereinafter cited as *Costly Pensions*]; *When Disability Pay Starts to Hurt*, Wash. Post, Jan. 12, 1978, § A, at 26, col. 1; *City Hall's 'Premier Ripoff'*, Wash. Post, Feb. 26, 1978, § D, at 6, col. 1.

66. As of January, 1977, 82% of retired police officers and 83% of retired firefighters were classified as disabled. *When Disability Pay Starts to Hurt*, *supra* note 65.

67. *Id.* See 1978 Hearings, *supra* note 1, at 660 (report of Edwin F. Boynton, Actuary for the Wyatt Co., retained by the Senate District Committee to study the District's pension funding). Boynton reported the following projections of payments that the District would have to make to annuitants:

Year of Payments	Total (\$ Thousands)*	Amount as a percent of the projected payroll**
1976	49,364	51%
1977	52,784	53%
1978	56,295	55%
1979	59,944	57%
1980	63,771	58%
1985	86,540	67%
1990	117,264	80%
1995	155,818	93%
2000	198,378	101%
2005	244,696	104%
2010	279,339	104%
2015	358,482	103%

* Amounts developed assuming five percent annual salary increases for active roll and four percent annual starting salary increases for new entrants. Figures assume a number of new entrants which would maintain the number of members at January, 1976 levels.

** Net payments for the District would be the percentage shown less seven percent to reflect member contributions to the pay-as-you-go system.

Id. at 693.

68. One article mentioned this improvement:

The percentage of disability retirements, which peaked at 97 percent of all those during the year 1970, has been steadily decreasing and was down to about 60 per cent last year. Still, few of those who decide to apply for disability are turned down, according to the board's own figures.

Costly Pensions, *supra* note 65, at 18, col. 2.

reform the District's pension system.⁶⁹

In 1978, both Houses of Congress finally⁷⁰ passed a bill acknowledging a limited federal responsibility to correct past congressional actions which had allowed the District of Columbia pension system to remain on an unfunded, "pay-as-you-go" basis.⁷¹ The bill also addressed the abuses of disability retirements which were prevalent under the provisions then in effect in the District. Reform of the disability provisions was perceived as a necessary adjunct to federal contribution in order to prevent federal funds from being misused.⁷² Surprisingly, however, the 1978 bill was pocket-vetoed by President Carter, who acknowledged some federal obligation but contended that Congress had overstated that responsibility and had not adequately addressed the abuses which occurred by virtue of ineffective administration of disability provisions.⁷³ Yet, despite the President's position, Congress remained substantially committed to those reforms⁷⁴ and adopted them again, virtually unchanged, in 1979.⁷⁵ This time, President Carter signed the District of Columbia Retirement Reform Act into

69. While lauding the three retirees for their dedicated service to the District, Senator Thomas F. Eagleton's opening remarks to the 1978 Hearings stated that "the coincidence of their retirements all within a matter of a few weeks raises the question of whether they are simply trying to get on the gravy train before Congress acts to correct the obvious abuses in the retirement systems." *1978 Hearings, supra* note 1, at 3. Senator Eagleton went on to categorize the District's pension system as "far and away the premier rip-off of pensions in the United States, second to none." *Id.* at 4.

70. Debate over the District's pension system and the extent of Congress' responsibility to contribute to the establishment of a funded system continued from 1974, *see* H.R. 15139, 93d Cong., 2d Sess. (1974), until 1979, when the District of Columbia Retirement Reform Act was finally enacted into law. Pub. L. No. 96-122, 93 Stat. 866 (1979). *See* note 58 *supra*.

71. H.R. 6536, 95th Cong. 1st Sess. (1978).

72. This concern was actually legislated into the act itself. Section 145 provided for a reduction in federal contributions should the District's rate of disability retirements exceed a certain ceiling. S. CONF. REP. NO. 1293, 95th Cong., 2d Sess. 17 (1978); H.R. CONF. REP. NO. 1713, 95th Cong., 2d Sess. 17 (1978).

73. *1979 Hearings, supra* note 11, at 150-51 (President's Memorandum of Disapproval). President Carter said that his administration was willing to assume a federal obligation of \$462 million over 25 years, but Congress's action would raise that obligation to \$1.6 billion over the same time period. *Id.* at 151. In what he termed Congress's "overstatement" of federal responsibility, the President felt that the Act failed to take into account abuses of the disability provisions for which the federal government was not responsible. *Id.* Likewise, he felt that "[a]lthough the bill's benefit and disability retirement reforms are desirable, its failure to apply these reforms to current employees constitutes a serious and costly deficiency." *Id.*

74. The 1979 Bill, S. 1037, 96th Cong., 1st Sess. (1979), did raise the length of service required for optional retirement to 25 years and age 50 for future employees. The 20 year retirement rule remains in effect for those who were currently employed. *Id.* § 203.

75. S. 1037, 96th Cong., 1st Sess. (1979). The conference report on S. 1037 was agreed to by the House of Representatives on Nov. 8, 1979. The Senate agreed to the report on Nov. 9, 1979. *See* 125 CONG. REC. S16490 (daily ed. Nov. 9, 1979).

law,⁷⁶ culminating over five years of discussion and legislation in Congress.⁷⁷

B. Ramifications of the Act

Perhaps the primary significance of the Act is its express recognition of a federal obligation to assist the District of Columbia in financing pension benefits conferred prior to home rule.⁷⁸ However, Title II of the Act also legislates some significant changes in retirement benefits.⁷⁹ Recognizing that abuses of previous disability provisions had contributed heavily to the increasing costs of the pension system,⁸⁰ the drafters were convinced that to be financially sound, the pension structure must be based on a properly functioning administrative scheme.⁸¹ Despite the many administrative reforms undertaken by the District,⁸² Congress nevertheless believed that the "laws themselves must be rewritten . . . to eradicate the potential for abuse in the future."⁸³ To this end, the Retirement Reform Act of 1979 eliminates the aggravation provision of section 4-527(2) for both current and newly hired employees.⁸⁴ The Act continues to permit aggravation

76. Retirement Reform Act of 1979, *supra* note 2.

77. *See* note 58 *supra*.

78. S. REP. NO. 237, 96th Cong., 1st Sess. 3 (1979). *See* note 13 *supra*. The Congressional Budget Office estimated the federal cost of the Act, assuming that there were no excessive police and fire disability retirements, to be \$65 million per year beginning in fiscal year 1981 and continuing through fiscal year 2005. S. REP. NO. 237, *supra*, at 75-77. The Act provides for reduction of the federal contribution whenever the rate of disability retirements exceeds by two percent a ceiling established by an annual estimation of the cost of disability retirements of District police officers and firefighters who were hired 90 days after enactment of the Act and who, therefore, were covered by all of the more stringent disability provisions therein. Retirement Reform Act of 1979, *supra* note 2, § 145, 93 Stat. 882. The Act requires the District to develop standards for disability retirements which would include "specific criteria for determining whether an injury was incurred, or a disease was contracted, in the performance of duty and whether an injury or disease was aggravated in the performance of duty" which should be developed in light of the "widest practical use of the medical expertise available to [the Board of Police and Fire Surgeons and the Retirement and Relief Board]." *Id.* § 213, 93 Stat. 915.

79. Retirement Reform Act of 1979, *supra* note 2, §§ 201-214, 93 Stat. 900-16.

80. S. REP. NO. 237, 96th Cong., 1st Sess. 4 (1979).

81. *See* 1977 *Hearings*, *supra* note 6, at 378-79 (statement of Representative Mazzoli at the full committee markup on H.R. 6536). *See also* 125 CONG. REC. S11267 (daily ed. Aug. 1, 1979) (remarks of Sen. Eagleton).

82. *See* notes 52-57 and accompanying text *supra*.

83. 125 CONG. REC. S11267 (daily ed. Aug. 1, 1979). Senator Eagleton added that he "would not support the expenditure of one dollar of Federal money without such reforms." *Id.* Senators Eagleton and Mathias had introduced the Bill on April 30, 1979. 125 CONG. REC. S4926 (daily ed. Apr. 30, 1979).

84. Retirement Reform Act of 1979, *supra* note 2, § 204, 93 Stat. 902. The reforms instituted by the Act distinguish between various categories of employees: current retirees,

claims for on-duty injuries but imposes reporting requirements for such injuries to facilitate later proof.⁸⁵ The aggravation provision of section 4-527(2) was generally regarded by Congress as the primary vehicle of abuse of the pension system⁸⁶ and the majority of those testifying at House and Senate hearings on proposed pension reforms supported its abolition.⁸⁷ Despite its "potential" for abuse,⁸⁸ however, the elimination of the aggravation provision will curtail access to on-duty disability retirement and preclude some justified claims for disability retirement benefits. Judicial and administrative reforms already undertaken, coupled with additional reforms contained within the Retirement Reform Act itself, will further curb abuse. Repeal of the aggravation provision is an overbroad attempt to decrease costs because it necessarily takes away legitimate grounds for on-duty disability retirement.

Elimination of the aggravation provision for current employees has other costs as well. One of the most difficult problems facing the Retirement Board and reviewing courts has been to assign on- or off-duty status to cases of psychological disability in which the claimant had a preexisting vulnerability to such condition which was either triggered or exacerbated by on-the-job factors.⁸⁹ In such cases, involving mixed causation or inor-

current employees, and new hires. The reason behind what is in effect a dual pension system is the recognition that the "legitimate expectations" of those employees hired prior to the reform should be honored. 1978 Hearings, *supra* note 1, at 9 (remarks of Mayor Walter E. Washington). See also 1978 Hearings, *supra* note 1, at 3 (remarks of Senator Eagleton) ("the Federal Government must recognize an obligation to the employees covered by these plans, most of whom were hired before home rule. Any pension plan changes must be fair and equitable to current employees and retirees, and must not create dissension."). A "new hire" is a person who first became a member of the police or fire department "after the end of the ninety-day period beginning on the date of the enactment of the District of Columbia Retirement Reform Act." Retirement Reform Act of 1979, *supra* note 2, § 205, 93 Stat. 905. Other sections specifically providing for new hires use the same criteria. See, e.g., §§ 201, 204, 93 Stat. 900.

85. Retirement Reform Act of 1979, *supra* note 2, § 204(2), 93 Stat. 903 (1979).

86. S. REP. NO. 237, 96th Cong., 1st Sess. 5 (1979).

87. See, e.g., 1978 Hearings, *supra* note 1, at 181 (statement of Donald Randall, Metropolitan Police Officials Ass'n); 1977 Hearings, *supra* note 6, at 265 (statement of David A. Ryan, Fire Fighters Ass'n of the District of Columbia); 1977 Hearings, *supra* note 6, at 205 (statement of Mayor Walter Washington). But see 1979 Hearings, *supra* note 11, at 200 (statement of John Markuns, Int'l Bhd. of Police Officers) (no need to eliminate provision, courts are stemming abusive application); 1978 Hearings, *supra* note 1, at 184-85 (statement of Joseph S. Goldring, Police Ass'n of the District of Columbia) ("strenuously opposes" reduction of benefits and repeal of aggravation clause).

88. See note 83 and accompanying text *supra*.

89. See *Morgan v. District of Columbia Police & Fireman's Retirement & Relief Bd.*, 370 A.2d 1322, 1325 (D.C. 1977); *Stoner v. District of Columbia Police & Fireman's Retirement & Relief Bd.*, 368 A.2d 524, 531 (D.C. 1977). For an analysis of the problem and the court's solutions in these two cases, see Casenote, 27 CATH. U.L. REV. 653 (1978).

ganic disabilities in which it is difficult or impossible to pinpoint the initial cause(s), elimination of the aggravation clause will significantly curtail the Retirement Board and reviewing court's ability to grant section 4-527 retirements. Formerly, the Board simply required proof that the disabling condition had been aggravated by on-duty factors.⁹⁰ Now, however, without the aggravation provision, decisionmakers will either arbitrarily have to assign causation to on-duty factors or deny an on-duty pension for lack of proof.

Judicial decisions prior to the 1979 repeal of the aggravation provision illustrate the difficulty of assigning an on- or off-duty status to a psychological condition. In *Stoner v. District of Columbia Police & Fireman's Retirement & Relief Board*,⁹¹ the District of Columbia Court of Appeals attempted to apply the "caused or aggravated" language of section 4-527(2)⁹² to mental or emotional disabilities which "appear[ed] to be the product of both a service-related trauma . . . and the individual officer's particular personality characteristics."⁹³ The difficulty arose because of the impossibility of ascertaining absolute causal relationships in the realm of a purely psychiatric disorder.⁹⁴ To resolve this dilemma, the court applied a "but for" analysis,⁹⁵ finding that "it was not petitioner's general psychological vulnerability which disabled him, but rather the accident-induced realization of the apparently underlying potential."⁹⁶

The court of appeals refined its "but for" approach when again confronted with a problem of mixed causation in *Morgan v. District of Columbia Police & Fireman's Retirement & Relief Board*.⁹⁷ There, the court applied a balancing test to determine the relative causative significance of the preexisting and duty-related circumstances which contributed to the disability.⁹⁸ The court held that relief may not be denied solely on the

90. D.C. CODE § 4-527(2) (1973 & Supp. 1978).

91. 368 A.2d 524 (D.C. 1977).

92. D.C. CODE § 4-527(2) (1973 & Supp. 1978). See note 21 *supra*.

93. 368 A.2d at 528.

94. *Id.* at 528 n.7 ("The problem with the statutory standard is that it contemplates the sort of clear and absolute causal relationships which are antithetical to the psychiatric sciences.").

95. *Id.* at 530 (" . . . but for the accident, petitioner would have been able to continue with his normal police functions.").

96. *Id.* In *Stoner*, the claimant was struck by a camper vehicle while on motorcycle patrol. He sustained "multiple fractures and other serious injuries." *Id.* at 526. Despite complete physical recovery, he was never again fit for active police duty, due to "post-traumatic neurosis" and "hysterical conversion reaction." *Id.* at 527 n. 4.

97. 370 A.2d 1322 (D.C. 1977). In *Morgan*, the claimant suffered from conversion reaction or psychoneurosis. *Id.* at 1324.

98. *Id.* at 1325.

finding that the officer had a "preexisting potential for psychological disability" and, conversely, that a mere showing that an on-duty trauma contributed to the disability is not conclusive.⁹⁹ The balancing test adopted in *Morgan* required that "in light of the humane purpose of the legislation, a denial of benefits should be based upon a proper determination that the causative significance of the preexisting or extrinsic circumstances contributing to the disability clearly outweighs that of the on-duty events or conditions."¹⁰⁰ Yet, the court was obviously not completely satisfied by this balancing approach since it mentioned that it was awaiting legislative guidance.¹⁰¹ Until such guidance was forthcoming, however, the court was inclined to give a claimant the benefit of a liberal construction of the disability provisions where causation was questionable, stopping short of reinstating the presumption that there was a connection between the on-duty trauma and the disability.¹⁰²

But, far from responding to the court's plea for legislative guidance,¹⁰³ the Retirement Reform Act of 1979 will create additional difficulties where the court or Retirement Board recognizes a legitimate claim since it must find that causation rests with on-duty factors in order to grant retirement under section 4-527.¹⁰⁴ In addition to cases involving purely psychological disabilities, the elimination of the aggravation provision will serve to preclude some retirements justified under section 4-527 in situations involving factors such as stress and poor working conditions,¹⁰⁵ where the claimant may or may not have had a pre-existing tendency toward the condition which was clearly aggravated by on-duty factors.¹⁰⁶ For example, an officer may merit a disability retirement after suffering a heart attack. While on-the-job tension and stress may have triggered the attack, the tendency toward heart trouble may result from nonwork-related factors such as

99. *Id.*

100. *Id.* The general process of proof outlined by the court in cases of mixed or obscure causation involved three steps: (1) the claimant must show a connection between his duty and the disability; (2) the government may counter this with "strong and credible evidence that external factors played a medically significant role"; and (3) if the government makes this showing, the claimant must demonstrate the "relative causative importance of the on-duty events or conditions." *Id.* at 1325-26 n.4.

101. *Id.* at 1325.

102. *Id.* at 1325 n.4.

103. See text accompanying note 101 *supra*.

104. The Act imposes reporting requirements which will force the court to deny these claims since the claimant is required to have reported the on-duty disease or injury within a specified time after its occurrence in order to preserve a right to have it classified as "on-duty." Retirement Reform Act of 1979, *supra* note 2 § 204(2), 93 Stat. 903.

105. See notes 5-8 and accompanying text *supra*.

106. See examples cited in 1978 *Hearings*, *supra* note 1, at 152, 184-85.

obesity, family history, smoking, or diet.¹⁰⁷ In the absence of the aggravation provision, which would have allowed an on-duty retirement where such factors were shown to exist provided an on-duty "triggering" was shown, such a claimant will now be unable to recover for on-duty disability even where he can meet the burden of proving that the on-duty factors clearly outweigh any preexisting condition. Thus, disability claimants who might never have become disabled but for duty-related factors will be precluded from retiring under section 4-527 and will be forced to accept the lesser benefits of an off-duty disability under section 4-526.

The creation of new problems of interpretation in cases involving mixed causation, and the inequities which will result when justified on-duty disability claims are rejected, renders the repeal of the aggravation clause a costly remedy for past abuses. This is particularly true in light of the decline in the proportion of disability retirements to service retirements¹⁰⁸ and the even greater decrease in disability retirements based on aggravation in relation to other disability retirements.¹⁰⁹ This decline may be attributed to two factors: the shift of the burden of proof to claimants in aggravation cases¹¹⁰ and administrative measures undertaken by the District.¹¹¹ Even further, the Retirement Reform Act of 1979 imposes a partial disability concept¹¹² which will serve to augment the judicial and administrative reforms in reducing the potential for abuse, and its inclusion in the Act is yet another reason why the aggravation provision need not have been repealed. Under this provision, the Board of Surgeons is to determine the percentage of mental or physical impairment suffered by a claimant. The Retirement Board will use that figure, as well as other factors,¹¹³ in determining the percentage of disability to be used in calculating the amount of annuity the retiree will receive.¹¹⁴ This provision means

107. *1978 Hearings, supra* note 1, at 184-85 (statement of Joseph S. Goldring, President, Police Ass'n of the District of Columbia).

108. *See* note 16 *supra*.

109. In 1971, disability retirements based on the aggravation clause accounted for 78% of all disability retirements. By 1977, that figure had declined to 21%. *1979 Hearings, supra* note 11, at 200 (statement of John Markuns, Int'l Bhd. of Police Officers). *See also id.* at 209 (Appendix A, letter of Mayor Marion Barry, Jr.) (since 1975, aggravation retirements less than 25% of all disability retirements).

110. *See* notes 42-51 and accompanying text *supra*.

111. *See* notes 52-57 and accompanying text *supra*.

112. Retirement Reform Act of 1979, *supra* note 2, § 204, 93 Stat. 902-04.

113. These factors include the nature of the disability, the claimant's age, years of service, position, and ability to earn other income. *Id.*

114. At a minimum, an annuitant under this section will receive 40% of his base salary at the time of retirement if injured on-duty. There is a 30% minimum for annuitants injured off-duty. *Id.*

that disability retirements will now be tailored to the needs and merits of individual claimants. The Retirement Board may now utilize a more flexible approach for weighing and allocating the possible causes of disability. Partial disability determinations will also serve as a disincentive for only marginally disabled claimants to take advantage of a disability retirement, since full disability retirements will no longer be granted for such retirees.

III. CONCLUSION

The District of Columbia Retirement Reform Act of 1979 represents a major step toward the establishment of a financially and administratively sound pension system for police officers, firefighters, teachers, and judges. It recognizes the need to maintain a funded system which will assure city employees that their families will be financially secure in the event of death or disability. The extent of the Act's impact on the administration of disability claims will to some extent depend upon the effect that measures such as the percentage disability provision will have in practice. While it is certain that the reforms undertaken by the Act will serve to reduce the possibility that the disability provisions will be abused, the repeal of the aggravation provision was an overreaction to vociferous public pressure and the history of past abuses. The District of Columbia Court of Appeals had already modified the interpretation of that provision to restrict abusive applications. Likewise, the District government had imposed various administrative reforms to tighten both the application of the provision and the enforcement of the recovery-from-disability provision. These administrative and judicial reforms had a substantial effect upon the number of disability retirements granted in the District. In addition, the Act itself imposes a percentage-of-disability provision which will serve as a disincentive to those who might otherwise have been tempted to make fraudulent disability claims. In combination with the judicial and administrative measures already in effect, the repeal of the aggravation provision must be viewed as an unnecessary sacrifice of a valid basis of disability retirement. This will preclude some disabled employees from obtaining an on-duty disability retirement even though they might never have become disabled had they chosen to pursue a less hazardous career.

Jean L. Kiddoo